

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION**

**TRADING PLACES INTERNATIONAL,
LLC,**

PLAINTIFF,

vs.

**SUMMERWINDS RESORT SERVICES,
LLC, ET AL.,**

DEFENDANTS.

CASE NO. 6:15-cv-03092-BP

MOTION TO DISMISS COUNTS II AND III FOR FAILURE TO STATE A CLAIM

COME NOW Defendants Summerwinds Resort Services, LLC and Stormy Point Village - Phase III Property Owners Association, Inc. ("Defendants"), by and through undersigned counsel, and for their Motion to Dismiss Counts II and III for Failure to State a Claim state as follows:

MOTION TO DISMISS AS TO COUNT II

In Plaintiff Trading Places International, LLC's ("Plaintiff") Count II of its Complaint, it is requesting damages for a claimed breach stemming from Defendant Stormy Point Village - Phase III Property Owners Association, Inc.'s ("Defendant Stormy Point") alleged repudiation of the contract between the parties. This claim for anticipatory breach alleges that by Defendant Stormy Point's actions in noticing a non-renewal for a 2010 agreement and its attempted merger with an adjacent property owners association it repudiated the agreement between the parties. In an anticipatory breach claim a party cannot provide notice of a breach and continue to complete

the contract and sue for the full contract price as damages. Fine Art Pictures Corp. V. Karzin, 29 S.W. 2d 170 (Mo. App. 1930).

In its Complaint, Plaintiff fails to allege whether it has in fact elected to terminate the contract and sue for damages. Plaintiff cannot have it both ways where it continues on with the contract, performing the contract and accepting performance and suing for its damages from point of alleged breach. Thus, either Plaintiff fails to allege that the contract was terminated or failed to allege a factual basis for damages which are both essential elements of a claim for breach of contract.

MOTION TO DISMISS AS TO COUNT III

Defendant Summerwinds Resort Services, LLC (“Defendant Summerwinds”) is by Plaintiff’s allegations to have an economic interest in the alleged contracts and the affairs of Defendant Stormy Point which Defendant Summerwinds is alleged to have induced to breach the same contracts.

Plaintiff’s allegations and exhibits demonstrate that Defendant Summerwinds has an economic interest in the affairs of the Defendant Stormy Point and is thus privileged to interfere in another’s contract. Deutsche Financial Services Corp. v. BCS Ins. Co. 299 F.3d 692, 696 (C.A. 8th Cir. 2002). Plaintiff alleged in its ¶ 19 that Defendant Summerwinds was a party to the 2010 Sub-Management Agreement (Plaintiff’s Exhibit C) upon which document Plaintiff alleges Defendant Summerwinds sent notice of nonrenewal. In addition, in the 2008 Management Agreement (Plaintiff’s Exhibit B) Defendant Summerwinds purportedly executed the agreement on behalf of Defendant Stormy Point.

Plaintiff alleges that Defendant Summerwinds has wrongfully interfered with the contract between Defendant Stormy Point and Plaintiff. In order to state a claim for tortious interference, Plaintiff must allege that Defendant Summerwinds caused or induced a breach of a contract. Fabricor Inc. v. E.I. DuPont De Nemours & Co., 24 S.W. 3d 82, 93 (Mo. App. W.D. 2000). In this matter, Count III relies on Count II as a condition precedent, in that as it has failed to terminate the contract on the alleged breach of Defendant Stormy Point it cannot uphold a claim against Defendant Summerwinds for allegedly causing Defendant Stormy Point to breach the contract which has not been terminated.

WHEREFORE, Defendants pray for an Order of this Court dismissing Counts II and III of Plaintiff's Complaint, and for such other and further relief as this Court deems just and proper.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above and foregoing was submitted this 28th day of April, 2015 via () U.S. Mail, () facsimile, () hand delivery, and/or (x) electronic mail to:

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